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No. 268

The Supreme Court of the United States

OCTOBER TERM, 1942.

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased Debtor,

Petitioner

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY,

Respondent.

PETITION FOR REHEARING

J. D. SKEEN,
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The Supreme Court of the United States

OCTOBER TERM, 1942.

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased Debtor,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY,

Respondent.

PETITION FOR REHEARING

Comes now Sterling P. Harris, administrator of the Estate of Anna L. Harris, deceased, and respectfully petitions this Court for a rehearing of the above entitled matter. This petition is based upon the following grounds, towit:

1. That the Court erred in holding that the administrator of the estate of a deceased person in the State of Utah, does not represent the heirs of the deceased, and further in assuming that the law of the State of Utah prohibits an administrator from dealing with the real estate of the deceased or limits his power to do so.

2. The Court erred in departing from the reason assigned for the dismissal of the former certiorari proceed-

ing in holding that the question, "Whether in such circumstances a district court of the United States sitting in Bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act," was not necessarily involved in the attack upon the decision of the Supreme Court of Utah, for the following reasons:

(a) That there is not now, and there may never be a conflict between the jurisdiction of the probate court and the jurisdiction of the federal court. The procedure in the two courts may be harmonized without the sacrifice of any rights on the part of the mortgagee.

(b) As a result of the filing of the debtor's petition in the federal court, the mortgagee has not and will not suffer such damage as would give it the right to attack the jurisdiction of the federal court, and

(c) Before nullifying the effect of a statute, the "Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Wright v. Mountain Trust Bank, 300 U. S. 440; 81 L. Ed. 736.

For the foregoing reasons, the petitioner prays that this petition for rehearing be granted.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioner.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is made and presented in good faith and not for delay.

J. D. SKEEN,
Attorney for Petitioner.

Brief in Support of Petition for Rehearing

The decision of the Supreme Court of Utah, in Sterling P. Harris, Administrator of the Estate of Anna L. Harris, deceased, v. Zion's Savings Bank and Trust Company, 99 Utah 464. 105 P. (2d) 461, does not purport to cover questions of the devolution of property and the duties and powers of the personal representative, but is confined to the negative holding that the State statutes do not expressly or impliedly authorize an administrator to file a petition in the federal court for relief under Section 75 of the Bankruptcy Act.

When this case was in this Court the first time on petition for certiorari to review the decision of the Supreme Court of Utah, it was thought proper to set out the germane portions of the probate code in order that this Court might properly construe the decision of the Supreme Court of Utah. After argument and in the dismissal of the case this Court said:

> "The decision thus rests upon an adequate non-federal ground, and as the federal question, whether in such circumstance a district court of the United States sitting in bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act, was not necessarily involved, the Writ of Certiorari is dismissed." (313 U. S. 541; 85 L. Ed. 1509).

It was thought that the concern of this Court with the probate code was at an end and therefore questions involving the powers of the probate court in Utah were not discussed in the brief. They were not specified as issues or discussed in the district court or the circuit court of appeals or in this Court on this petition. They were referred to only in an incidental way in the oral argument. Substan-

tially all that had been claimed or admitted by either party is that under the Utah law the title to real or personal property passes to the heirs,

> "*subject to the control of the court and to the possession of any administrator appointed by the court for the purposes of administration.*" (R. S. 101-4-2).

And that is all the Supreme Court of Utah determined.

In this state of the record we assumed, from the memorandum dismissing the former writ, this Court meant in effect, that it would look to the federal law to determine whether authority was given to the administrator by section 75, to file the petition, and that the appeal would be determined on the assignments in the Circuit Court of Appeals and in this Court, and not upon questions of probate law. In other words, that the questions discussed in the minority opinion of this Court would be determinative of results.

We freely confess our misconception of the record and consequently our failure to aid the Court by bringing to it the Utah probate law, and we accept responsibility because of this failure for the misconception by the Court of the probate law. The statement of the Court is in fact wholly out of line with the Utah statutes respecting administrators which has been crystalized and settled wholly beyond controversy since Utah was organized as a territory.

The Court has said in referring to heirs: "The administrator does not represent them." This seems to be a fundamental premise upon which the Court bases its conclusion, for the Court said further,

> "If the law of a state prohibits an administrator from dealing with the real estate or conditions his power so to do, did Congress intend to override that law and confer upon this mandatory of

State power, a privilege at war with the law of his official being?"

In support of this petition we bring to the attention of the Court the probate law of Utah, set out in the appendix.

I.

THE ADMINISTRATOR UNDER THE UTAH LAW TAKES AND HOLDS EXCLUSIVE POSSESSION OF REAL AND PERSONAL PROPERTY, AND IN DOING SO REPRESENTS THE HEIRS AND ALL PERSONS INTERESTED IN THE ESTATE.

It will be seen from the statutes set out in the appendix that while the "naked" title to real and personal property passes to the heirs of the deceased, that the qualification "subject to the control of the court and to the possession of any administrator" for all practical purposes nullifies what goes before, for by section 101-4-2, appendix No. 1, the administrator must take possession. He has no discretion in the matter, appendix No. 3. By section 102-11-4, appendix No. 4, his possession by express terms is the possession of the heirs. He may maintain suits for the recovery of property, to quiet title thereto, and in all other cases, the same as the deceased might have done. He must sue to recover property. He must sue for waste, destruction or conversion of the property. Appendix Nos. 5, 6. He may continue to conduct the business of the deceased. He may compromise claims, appendix 8, and he is required to account absolutely and unconditionally for all property received or recovered. Appendix No. 9. He may not profit from the estate. Appendix 10. Suit for specific performance may be maintained against him. Appendix No. 11. He may sell stocks and bonds usually sold on a stock ex-

change and pass title without confirmation by the court. Appendix No. 12.

He may sell the real estate without order of the court, but before title passes he must have the sale confirmed.

Secs. 102-10-5 and 102-10-14, Laws of Utah, 1939. Chapter 113, Page 154.

Appendix 13. The surviving husband and wife and minor children may remain in possession of the homestead until otherwise ordered by the court and finally when all debts are paid or when there is sufficient money in the hands of the administrator to pay all debts, he may, upon petition to the court, and upon decree of distribution turn the property, real and personal, over to the heirs. Appendix No. 12.

Section 102-12-6, Appendix No. 15.

Until, therefore, the decree of distribution is made, not only does the administrator represent the heirs, but he is the exclusive representative. They cannot touch the property, and except as to the widow, they are not entitled to the possession of any part thereof. On the contrary, until the administrator makes his report to the court and procures a decree of distribution, partial or final, he is chargeable with all property which he is required to take possession of and he gets his credit only by showing disposition of the property either through sales or by delivery to heirs under order of the court. Until this is all done, he is bound on his bond and is liable to whomsoever is entitled to the property. Appendix No. 9.

The probate law of Utah is not like the probate law of Illinois and perhaps some other States. See

Buxton v. Illinois, 14 Fed. Supp. 616,

where the administrator takes possession of the real estate only upon order of the court. That case is not at all in

point, and it may be respo[illegible]e for the erroneous statement as to the law of Utah.

We may add here that in no State so far as we have been able to ascertain has an administrator more exclusive control of property than in Utah and in no other State does he more fully and exclusively represent the heirs. The statement of the court is so far at variance with the law that it can be attributed only to inadvertance. Furthermore, it is so interwoven with the decision of the court, it would seem that the error can be corrected only by granting this petition for rehearing in order that there may be a discussion of this phase of the subject preliminary to the writing of another opinion.

II.

(a). We may very appropriately call attention to a fundamental principle frequently referred to by this Court.

In Wright v. Mountain Trust Bank, 300 U. S. 440; 81 L. Ed. 736, the Court said:

> "' . . . When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'
>
> Crowell v. Benson, 285 U. S. 22, 62; 76 L. Ed. 598, 619; 52 S. Ct. 285."

In Citizens National Bank v. Commonwealth of Kentucky, for the Use and Benefit of Boyle County, et al., 217 U. S. 443; 54 L. Ed. 832, 836, where the validity of a tax was involved, the Court said:

> "As thus appli[illegible]d, the bank has neither been deprived of any [illegible]ghts nor compelled to bear any

burden in conflict with Section 5219, Rev. Stat., upon which it relies for protection. But if it be assumed — an assumption not sustained by any decision of the Kentucky court of appeals — that the 3d section is broad enough to include liability for delinquent taxes claimed from both resident and nonresident stockholders, none of the latter class are here complaining, and such an objection cannot be made by one unaffected by the alleged invalid feature. Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224; Albany County v. Stanley, 105 U. S. 305, 26 L. Ed. 1044; The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.,) 205 U. S. 354, 51 L. Ed. 836, 27 Sup. Ct. Rep. 509."

In Iroquois Transp. Co. v. De Laney Forge & I. Co., 205 U. S. 354; 51 L. Ed. 836,

the Court referred to an argument assuming a conflict between a State and Federal statute, and said:

"But no such supposed embarrassment has yet occurred, and they are as yet imaginary. . . . There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other should require it; but that is an incident common along all lines of concurrent proceedings in the State and Federal courts, and gives no ground for the denial of jurisdiction to either."

(b). The Bank is entitled to its money or to the value of its security if less than the debt, and it has no constitutional claim to anything in addition thereto.

"And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor

and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mut. L. Ins. Co. v. Bartels, supra; Kalb v. Feuerstein, 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343, 41 Am. Bankr Rep. (NS) 501 supra), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

Wright v. Union Central Life Insurance Co., 311 U. S. 273, 85 L. Ed. 184.

The statute protects that right. This Court said so in

Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al, 300 U. S. 440, 81 L. Ed. 736,

and if this Court had not said so and adhered to that rule, the proceeding would not now be before the Court. The most that can be claimed by the creditor is that the consummation of the mortgage foreclosure has been postponed; but that is not sufficient to justify a narrow construction of the statute which eliminates all estates from its protection. Certainly the rights of the estates are being frittered away, and in fact, absolutely destroyed by the technical construction insisted upon by the Bank. The reasoning of the Court is not only based upon a premise contrary to the laws of the State of Utah, but the conclusions are not in harmony with the conclusions heretofore reached by this Court in

Wright v. Union Cent. L. Ins. Co., supra;

John Hancock Mut. L. Ins. Co. v. Bartels, 308 U. S. 180;

Kalb v. Feuerstein, 308 U. S. 433;

Borchard v. California Bank, 310 U. S 311, and others.

And now, after years of expensive litigation, doubts as to the constitutionality of this phase of the statute have

been raised and the clear language of the statute qualified to the extent that we are back where the Court left us in

Louisville v. Radford, 295 U.S. 555, 79 L.Ed. 1593

Why should this conclusion be reached in this case if the Bank is not harmed, and measured by the yardstick used in Wright v. Vinton Branch, 300 U. S. 440, 81 L. Ed. 736 it is not; and if there are no conflicting orders between the State court and the Federal court, and there are none, because no orders have been made. It is true, the Supreme Court of Utah said:

> "Neither the administrator nor the probate court has any power express or implied to permit one to carry the estate out of the power of the probate court or the latter to divest itself of jurisdiction and permit the estate and its officer to become subject to another tribunal from which neither may be reclaimed." (99 Utah, 464).

But was the Supreme Court of Utah justified in assuming that even though it had jurisdiction, that Section 75 permitted the dissipation of the estate; or that the Federal court would not respond to a direct request of the probate court that a federal court proceeding be brought to an end in the interest of creditors or heirs if prejudice was being suffered.

The decisions of this Court are to the effect that creditors are not prejudiced by the administration of property under the statute, and the Utah Court cannot assume that the federal district court would not do its duty and that therefore a conflict might, at some future time, arise. Such an imaginary conflict does not justify the practical denial of rights under the federal statute. It will be time to decide whether the constitutional power of Congress to enact uniform statutes upon the subject of bankruptcy is to be restricted, when such a controversy arises.

We conclude that a rehearing should be granted:

1. Because this Court has inadvertantly misconstrued the law of Utah applicable to estates of deceased persons on a matter which may have far-reaching and prejudicial effects, and which has lead to erroneous conclusions in this case.

2. That the administrator had the clear statutory right to file a petition for relief under
   Section 75 of the Bankruptcy Act
   to have the petition entertained, and to make available for the estate the benefits of the law.

3. That the proceeding under Section 75 should continue until interrupted or terminated by a proper order made by the Federal Court pursuant to the statute, and after request of the probate court.

4. That neither the secured creditor nor any heir has the right to challenge the jurisdiction of the Court upon the question of the conflict between the probate statutes of the State of Utah, and Section 75, until it is shown that it has been damaged or prejudiced through the operation of the statute; and no such a showing has been made in this case.

5. That questions of construction of Section 75 (r) as applied to estates, and more specifically whether its application should be restricted or limited, cannot be brought before the Court until there is in fact a conflict between orders made by the Federal and State courts.

Respectfully Submitted.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioner.

APPENDIX

The following references are to sections in the Revised Statutes of Utah, 1933:

1. Section 101-4-2: Property of Intestate Passes to Heirs, Subject to Probate Proceedings.

   "The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration."

2. Section 102-12-8: Decree — Rights of Distributees.

   "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares from the executor or administrator or any person having the same in possession."

3. Section 102-11-3: Right to Possession of Property — Actions to Recover.

   "The executor or administrator is entitled to, and must take possession of, all the real and personal estate of the decedent, and shall receive the rents and profits of the real estate until the estate is settled or delivered over by order of the court to the heirs or devisees; and must keep in good tertantable repair all houses, buildings and fixtures thereon which are under his control, and collect all debts due to the decedent and to the estate. The heirs or devisees may alone, or jointly with the executor or administrator, maintain an action for the possession of the real estate or

for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as to require them so to do."

4. Section 102-11-4: Possession of Representative Possession of Heirs and Devisees.

"For the purpose of bringing suits to quiet title, or for partition of the estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this title."

5. Section 102-11-5: Actions By or Against Representatives For Recovery of Property.

"Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

6. Section 102-11-6. Actions for Waste, Trespass, Conversion.

"Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testators or intestate in his lifetime. They may also maintain actions for trespass committed on real estate of the decedent in his lifetime."

7. Section 102-11-8: Continuing Decedent's Business.

"When the interests of creditors are not prejudiced thereby, the court may prescribe that the business in which the decedent was engaged at the time of his death may be continued for such length of time as may be necessary to permit the affairs of the estate to be wound up to the best advantage."

8. Section 102-11-12: Compromising With Debtors.

"Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court or judge, may compound with him and give a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interests of the estate."

9. Section 102-11-20: Representative Charged With Whole of Estate.

"'Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profits and income of the estate."

10. Section 102-11-21: Not to Profit or Suffer Loss on Account Of.

"That the personal representative shall not make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made."

11. Section 102-11-26: Specific Performance of Decedent's Contracts.

"When a person, who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer or delivery, the court may make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto."

12. Section 102-10-11: Sale of Stocks, Bonds, Etc.

"In the case of sales of stocks, bonds or other choses in action likely to fluctuate in value and that are regularly sold and purchased on any stock exchange sanctioned by the securities commission, or other like institution, when sold by the executor or administrator upon such stock exchange or other like institution no confirmation thereof by the court shall be necessary before title passes; but title to property thus sold shall pass upon and by virtue of such sale."

13. Section 102-10-5, Chapter 113, Laws of Utah, 1939. Sales—Report and Confirmation.

"The executor or administrator may sell any property of the estate without order of the court, at either public or private sale and with or without notice as he may determine, but must make return of such sales in all cases; and if directions are

given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In any case, no title passes unless the sale is confirmed by the court."

14. Section 102-10-14, Chapter 113, Laws of Utah, 1939: Petition for Order Confirming Sale of Real Estate.

"To obtain an order confirming the sale of real property the executor or administrator must present a verified petition to the court setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; and, if said order confirming the sale of real estate is petitioned for on the ground that it is for the advantage, benefit and best interests of the estate and those interested therein that the sale be confirmed, the petition, in addition to the foregoing facts must set forth in what way an advantage or benefit would accrue to the estate and those interested therein by such sale. If the executor or administrator neglects to apply for an order confirming said sale where it is necessary, any person interested may make application therefor."

15. Section 102-12-6: Final Distribution— Settlement of Accounts — Petition — Notice.

"When all debts are paid, or sooner if before that time all the property of the estate has been sold or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate is in proper condition to be closed, the executor or administrator must render a final account and pray for settlement of his administration. Such petition shall contain the names and addresses of the heirs, devisees or other persons entitled to participate in such distribution, according to the best knowledge, information and belief of the executor or administrator. The clerk shall file the petition, and the court or clerk shall fix the date of hearing thereon, notice of which shall be given."

SUPREME COURT OF THE UNITED STATES.

No. 268.—October Term, 1942.

Sterling P. Harris, Administrator of the Estate of Anna L. Harris, Deceased, Debtor, Petitioner, *vs.* Zion Savings Bank and Trust Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[January 11, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

December 20, 1937, Anna L. Harris filed her petition for relief under § 75 of the Bankruptcy Act[1] in the District Court for Utah. She made an offer of composition and, while this offer was pending, she died. January 16, 1939, the bankruptcy court ordered the proceeding abated because of her death. March 30, 1939, the petitioner was appointed administrator of her estate.

Thereafter the respondent instituted a foreclosure proceeding upon a mortgage on real estate of the decedent, obtained a judgment, and, August 15, 1939, purchased the mortgaged premises at foreclosure sale and received a sheriff's certificate.

February 13, 1940, two days before the period of redemption expired, the petitioner, as administrator, secured leave from the probate court to apply, as the decedent's personal representative, for an order reviving the debtor proceedings. The probate court's decree was stayed pending an appeal to the Supreme Court of Utah. Notwithstanding the stay, the petitioner applied to the bankruptcy court for a revivor.

The Utah Supreme Court reversed the decree of the probate court, holding that, under the probate code, the court had no authority to authorize the administrator to petition the federal court under § 75.[2] This court granted certiorari to review the judgment[3] but, after hearing, dismissed the writ on the ground that the decision rested on an adequate non-federal ground.[4]

[1] 11 U. S. C. § 203.

[2] In re Harris' Estate, 99 Utah 464, 105 P. 2d 461.

[3] 312 U. S. 670.

[4] Harris v. Zion Savings Bank & Trust Co., 313 U. S. 541.

Pending hearing in this court, the petitioner, on September 18, 1940, lodged with the clerk of the bankruptcy court an amended petition to be adjudged a bankrupt under subsection (s) of § 75. The court ordered that the paper be not filed and also ordered that the petitioner show cause why his revivor petition should not be dismissed. August 29, 1941, the respondent moved to strike both the original and amended petition. September 30, 1941, the district judge entered an order dismissing the administrator's petition to revive and rejecting the amended petition.

October 10, 1941, the petitioner sought leave of the probate court to appeal from the bankruptcy court's order of dismissal and rejection. The prayer was denied, and the court held that the petitioner should not be authorized to appeal. The petitioner, nevertheless, appealed to the Circuit Court of Appeals, which affirmed the District Court's action.[5]

Subsection (c) of § 75 provides: . . . "A petition may be filed by any farmer" . . . for the extension and composition of his debts. Subsection (r) declares: "For the purpose of this section . . . the term 'farmer' includes the personal representative of a deceased farmer;" . . .

The question is whether an administrator may, in his representative capacity, initiate such proceedings without leave of the court which appointed him and has jurisdiction over him, or may do so where, as here, he has applied for leave and been denied it. The importance of this question, and a diversity of views amongst the federal courts,[6] led us to grant certiorari.

Put another way, the question is,—if the law of a state prohibits an administrator from dealing with the real estate, or conditions his power so to do, did Congress intend to override that law and confer upon this mandatory of state power a privilege at war with the law of his official being? We must meet that question in this case, for the Supreme Court of Utah has told us that, under the law of that State, the petitioner has no such power. If such he possesses, it derives from a law which overrides the law of the petitioner's official creation.

Laying aside any issue of constitutional power, the question remains whether Congress intended so to override the law of a

[5] 127 F. 2d 1012.

[6] Compare In re Buxton's Estate, 14 F. Supp. 616; In re Reynolds, 21 F. Supp. 369; Lamm v. Northern California National Bank, 93 F. 2d 709; Hines v. Farkas, 109 F. 2d 289.

state and confer on the state's appointee, as *persona designata*, a function to be exercised not for the deceased farmer, not for the decedents' estate, the entity he represents under state law, not for the heirs who inherit the realty, but in a vacuum?

When we reflect that the settlement and distribution of decedents' estates, and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of § 75 consistent with these principles. We think the beneficent purpose of the legislation will not be defeated by such a construction.

The section is a manifestation of the enlarged conception of the bankruptcy power as extending not alone to a seizure of an insolvent debtor's assets in the interest of an impartial application of them to his creditor's demands, but also as a means of relieving his distress and rehabilitating him financially while rendering his creditors all for which they may reasonably hope.[7]

So the opportunity of resort to § 75 enures not to creditors but to the debtor. His voluntary action, not theirs, determines whether the law shall be invoked. Congress extended him a privilege which he could exercise or renounce. By the provision that the term "farmer" should include a personal representative, Congress extended that privilege to an administrator. But, clearly, if that functionary elects not to avail himself of the privilege, the section is, as to him, inoperative. Moreover, if his election depends, under the law of his being, not alone on his choice but upon the exercise of the choice of his master, the state which gave him official life, and under whose tutelage he is, then the door of the bankruptcy court is open to him only when that choice has been exercised in the only way he can exercise it.

In this view Congress has extended the benefits of the act only to administrators who can lawfully elect to avail of them. Thus conflict between federal and state power is avoided and the two are accommodated.

The opinion of the Supreme Court of Utah points out some of the many inconsistencies and difficulties an opposite conclusion

[7] Local Loan Co. *v.* Hunt, 292 U. S. 234, 244; Continental Illinois Natl. Bank & T. Co. *v.* Chicago, R. I. & P. Ry. Co., 294 U. S. 648, 667-675; United States *v.* Bekins, 304 U. S. 27, 47; Wright *v.* Union Central L. I. Co., 304 U. S. 502, 514; Wright *v.* Union Central L. I. Co., 311 U. S. 273, 279.

would entail. Under the law of the State realty descends directly to the heirs. The administrator does not represent them. In resorting to § 75 he may, or may not, be acting in their true interests. The law of the State demands the speedy settlement of the estate. If independently of that law the administrator may apply under § 75, it may well happen that this state policy will be nullified. In other states an administrator may succeed to the realty absolutely or in such measure and for such purpose that no state policy would be contravened by resort to § 75. But, in any case, the interests of those entitled to inherit ought to be considered before choice of action is determined. The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate.

We cannot accept the view that § 8 of the Bankruptcy Act[8] governs. That provision was part of the Act of 1898 and looked only to proceedings wherein title to the assets was transferred from the bankrupt as of the date of petition and vested in a trustee, and wherein the assets were to be liquidated promptly and the proceeds distributed amongst creditors. In other words the purpose and effect of the proceeding in bankruptcy and that in the probate court were the same. Under § 75 they are or may be at war, the one preventing the liquidation which is the chief aim of the other. In other respects § 8 is inapplicable. Why, in a case like this, should the heirs, the owners of the equity in real estate, be made parties against their will?[9]

Congress, when the matter has come to its attention, has expressly recognized that if a moratorium proceeding such as this is to be brought or revived by an administrator he ought to obtain leave from the probate court. So § 74, as amended, provides.[10] We think the same intent should be implied as to § 75.

We believe that it was with these considerations in mind that this court adopted Order 50(9) of the General Orders in Bankruptcy.[11] That order provides that the personal representative of a farmer shall annex to his petition filed under § 75, amongst other things, a copy of the order of the probate court authorizing him to file the petition. The court below thought the General Order

[8] 11 U. S. C. § 26.

[9] See Shute v. Patterson, 147 Fed. 509.

[10] 11 U. S. C. § 202.

[11] General Orders in Bankruptcy of January 16, 1939, 305 U. S. 681, 11 U. S. C. A. following § 53.

applicable and felt bound to apply it. It is suggested that this portion of the Order is void as running counter to the clear mandate of the statute. And so it would be if the Act conferred upon the administrator the right, notwithstanding state law, to invoke the bankruptcy powers. But the rule comports with what we have endeavored to show is the natural and reasonable construction of § 75. If the state law permits resort to the remedy afforded by the section, no difficulty will be created by requiring the obtaining of such an order. If it forbids, then no conflict between the policies of state and nation will arise.

The judgment is affirmed.

Mr. Justice DOUGLAS, dissenting.

Sec. 75(r) includes "the personal representative of a deceased farmer" within the definition of "farmer" as that term is used in the Act. Sec. 75(n) provides that in these proceedings "the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer . . . shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt" was filed. Since that provision relates to the "jurisdiction and powers" of the bankruptcy court as well as to the "rights and liabilities" of creditors and "of all persons" with respect to the property, I do not see how we can escape the conclusion that it incorporates § 8 of the Bankruptcy Act. Practically identical provisions in old § 74(m), dealing with compositions and extensions, were held to have that effect. *In re Morgan*, 15 F. Supp. 52. Cf. *Benitez* v. *Anciani*, 127 F. 2d 121. The function and purpose of § 74 and § 75 are comparable. No reason is apparent why a different result should obtain under § 75. Sec. 8 of the Bankruptcy Act states that death of a bankrupt "shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died". That section "makes no exception or qualification—

after the proceedings have been commenced they are not to be abated by death." *Hull* v. *Dicks*, 235 U. S. 584, 588. It has long been considered mandatory. *Shute* v. *Patterson*, 147 Fed. 509; 1 Collier, Bankruptcy (14th ed.) § 8.02. On death of a bankrupt where his personal representative succeeds to the personalty and his heirs to the realty, the proper procedure is to make them parties. *Shute* v. *Patterson*, *supra*, p. 512; *Benitez* v. *Anciani*, *supra*, p. 125. And see *In re Schwab*, 83 F. 2d 526. And the death of a bankrupt does not prevent his discharge (Collier, *loc. cit.*) at the instance of the administrator. *In re Agnew*, 225 Fed. 650.

If this had been an ordinary bankruptcy case there can be no doubt that the personal representative of this decedent would have been entitled to come in, that the heirs could have been joined, and that a discharge could have been obtained provided the requirements of § 14 were met. The fact that the proceeding is under § 75 should not make a difference. Congress has specifically stated that a "personal representative" of a farmer may employ the machinery of § 75. The offer of composition made by the decedent before her death might or might not have been accepted. But even though it were rejected, subsection (s) affords an alternative form of relief, one benefit of which is a discharge. § 75(s)(3); *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273. I think it clear that § 75 was designed to afford to the estate the opportunity to obtain these benefits. Those benefits may be just as considerable as they would be in ordinary bankruptcy. The fact that the heirs would be held at bay is no more significant in this instance than it is in other applications of § 8 of the Bankruptcy Act. To be sure, title to the property vests in the trustee in ordinary bankruptcy. But that circumstance has no relevancy to the scope of the jurisdiction of the bankruptcy court under § 75 which is in issue here and which we recently stated was "exclusive", carrying with it "complete and self-executing statutory exclusion of all other courts.". *Kalb* v. *Feuerstein*, 308 U. S. 433, 443. Furthermore, Congress has not made participation of the personal representative dependent on authorization from the state probate court. Under old § 74 it did. Thus § 74 as amended by the Act of June 7, 1934 (48 Stat. 922, 11 U. S. C. 202a), an Act which also contained certain amendments to § 75 (48 Stat. 924, 925), included "the personal representative of a deceased individual for the purposes of effecting settlement or composition with the creditors of the estate:

Provided, however, That such personal representative shall first obtain the consent and authority of the court which has assumed jurisdiction of said estate, to invoke the relief provided" by that Act. No such qualification appears in § 75. Its absence there and its presence in § 74 clearly indicate that where Congress wished to curtail the power of bankruptcy courts over estates of decedents and to make the participation of a personal representative dependent on authorization from the state probate court, it said so. The view I urge would of course result in a collision between the Bankruptcy Act and state probate law. But that is no more important here than was the collision in *Kalb* v. *Feuerstein, supra.* In this case, as in other situations (*In re Devlin,* 180 Fed. 170, 172) it is the bankruptcy act not local probate law which must control the administration of the estate. The bankruptcy power is supreme. Sec. 8 is a valid exercise of that power. The result is that General Order 50(9) must give way insofar as it is inconsistent with this result. For those rules are intended merely "to execute the act" (*West Co.* v. *Lea,* 174 U. S. 590, 599) not to "authorize additions to its substantive provisions." *Meek* v. *Centre County Banking* Co., 268 U. S. 426, 434.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.